NO. 42851-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD CHARLES HALSTEN,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and violated CrR 4.2(f) when it refused to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered.

2. The trial court's lack of impartiality and consideration of evidence not in the record violated the defendant's right to have his case decided by a fair and impartial judge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and violate CrR 4.2(f) if it refuses to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered?

2. Does a trial court's lack of impartiality and consideration of evidence not in the record violate a defendant's right to have his case decided by a fair and impartial judge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

By information filed August 15, 2011, the Lewis County Prosecutor charged the defendant Edward Charles Halsten with two counts of delivery of methamphetamine occurring on June 14, 2011, and July 27, 2011, and one count of possession of methamphetamine with intent to deliver on August 12, 2011. CP 1-3. The information did not allege any enhancements. *Id.* The state later filed a witness list with four names on it, including two police officers, a forensic scientist and a confidential informant. CP 5. At the defendant's first appearance, the court appointed an attorney to represent him on its finding that the defendant was indigent. RP 11/3/11 6-8[1]. That attorney later withdrew, apparently upon finding out that he had or was then representing the confidential informant in the case. CP 6-7; RP 11/3/11. Following this withdrawal, the court appointed Mr. Christopher Baum to represent the defendant. RP 11/3/11 7.

Following his appointment, the defendant's new attorney met with the prosecuting attorney and negotiated a plea bargain. RP 11/3/11 24-26. Under that agreement the defendant would plea to the two delivery charges in counts I and II, in return for a dismissal of the third count, a

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[1]The record on appeal includes a verbatim report for the guilty plea hearing from September 29, 2011, and the combined Motion to Withdraw Guilty Plea and sentencing hearing from November 20, 2011. Since the court reporter did not consecutively number the two volumes, there are referred to herein as "RP [hearing date] [page #]."

recommendation from the state of 75 months in prison on a range of 60 to 120 months on an offender score of 7 points, along with the right to request a prison based DOSA sentence. *Id.* According to Mr. Baum, he spoke in detail with the defendant about the facts of the case, the state's evidence, and the possible outcome of a trial. RP 11/3/11 24-28. In addition Mr. Baum later testified that he had tried to get the defendant admitted into drug court, but the prosecutor refused based upon the type of charges. *Id.* According to the defendant, Mr. Baum had failed to talk to him about the evidence in his case, and had implicitly coerced him into accepting the plea bargain by failing to even talk to the defendant about the facts of the case, much less prepare a defense. RP 11/3/11 6-10.

Regardless of which version of events was correct, the record is clear that on September 29, 2011, the defendant appeared with Mr. Baum and pled guilty under the plea agreement. RP 9/29/11 1-10. During the guilty plea colloquy, the court did not tell the defendant that he had the right to go to trial before a jury, the right to cross-examine the state's witnesses, the right to call his own witnesses, and the right to compel the presence of those witnesses. RP 9/29/11 1-10. Rather, the court made the following short statement to the defendant and then asked the following question: "On the second page [of the guilty plea form] is a listing of the right that you have. Did you review you[r] rights with Mr. Baum?" The defendant replied by

saying "Yes, I have." RP 9/29/11 8.

During the guilty plea colloquy, the court also asked the defendant: "Is anyone forcing you to do this." RP 9/29/11 10. The defendant responded with a single word "No." *Id.* The court did not ask the defendant whether or not he was satisfied with the services of his court-appointed attorney and did not ask whether or not he felt compelled to plead guilty based upon his perceived deficiencies in the representation he received. *Id.* In fact, the entirety of the colloquy between the court and the defendant takes up about four pages of transcript. RP 9/29/11 7-11. The following quotes that colloquy in its entirety:

> THE COURT: All right. You are Edward Halsten?
>
> THE DEFENDANT: Yes, I am, sir.
>
> THE COURT: Mr. Halsten, have you heard, understood, and do you agree with everything your attorney has told me so far?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm told you're considering entering a plea of guilty to Count One, delivery of – and Two, delivery of controlled substance. Is that what you think you're doing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you gone over each and every line of this statement of defendant on plea of guilty with Mr. Baum?
>
> THE DEFENDANT: Yes, I have, Your Honor.
>
> THE COURT: Do you feel you understand it completely?

THE DEFENDANT: Yes.

THE COURT: On the first page there's the name of each crime and the elements of each crime. The elements are what the state has to prove beyond a reasonable doubt for you to be found guilty of these offenses. Did you review the elements with Mr. Baum?

THE DEFENDANT: Yes, I have.

THE COURT: Do you feel you understand them?

THE DEFENDANT: Yes.

THE COURT: On the second page is a listing of the rights that you have. Did you review you rights with Mr. Baum?

THE DEFENDANT: Yes, I have.

THE COURT: Do you feel you understand your rights?

THE COURT: You understand you give those rights up by entering a plea of guilty.

THE DEFENDANT: Yes.

THE COURT: On the fourth page is a sentencing recommendation that the prosecutor will make at the time of sentencing, which will not be today. I'm assuming that you have reviewed that carefully with Mr. Baum; is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that the sentencing judge, whoever it may be, does not have to follow that recommendation and is free to give you any sentence the judge feels is appropriate regardless of what anyone else may recommend.

THE DEFENDANT: Yes, sir.

THE COURT: That includes not accepting the DOSA –

THE DEFENDANT: Right.

THE COURT: – an alternative. Do you understand that?

THE DEFENDANT: Right.

THE COURT: All right. Knowing that you're giving up your rights and that the sentencing judge is not bound by the prosecutor's recommendation here, do you still wish to enter a plea of guilty?

THE DEFENDANT: Yes, I do.

THE COURT: You understand that if you're not a citizen of the United States a plea of guilty to this offense could result in a change in your alien status including deportation.

THE DEFENDANT: Yes.

THE COURT: Is anyone forcing you to do this?

THE DEFENDANT: No.

THE COURT: Has anyone threatened harm of any kind against you or anyone else to cause you to enter this plea?

THE DEFENDANT: No.

THE COURT: Or these pleas I should say. Other than what the prosecutor promises to recommend at sentencing, has anyone made any promises to you to cause you to enter this plea?

THE DEFENDANT: No.

THE COURT: In paragraph 11 you're asked to state in your own words what it is that you did that makes you guilty of this offense, and here's what appears there: In Lewis County on June 14th, 2011 and July 27th, 2011 I knowingly delivered methamphetamine. When you say you knowingly delivered methamphetamine, you knew what it was that you were delivering; is that correct?

THE DEFENDANT: Yes.

THE COURT: With that addition, is that your statement?

THE DEFENDANT: Yes, it is.

THE COURT: Is it a true statement?

THE DEFENDANT: Yes, it is.

THE COURT: Then to the charge in Count One of violation of the Uniform Controlled Substances Act, delivery of methamphetamine, what is your plea, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Count Two, a violation of the Uniform Controlled Substances Act, delivery of methamphetamine?

THE DEFENDANT: Guilty.

THE COURT: Guilty? All right. I'll find your pleas are knowingly, intelligently, and voluntarily made with an understanding of the charges and the consequences of the plea, there's a factual basis for each plea, and that you're guilty as charged. All right. You have the order for the DOSA evaluation?

RP 9/29/11 7-11.

Very shortly after entering this guilty plea, the defendant instructed his attorney to file a motion to withdraw the plea on an argument that counsel had coerced the plea by failure to adequately prepare the case. CP 26; RP 11/3/11 28-33. Based upon that allegation, the court appointed a new attorney to represent the defendant. *Id.* This new attorney prepared a motion and filed it along with an affirmation by the defendant. CP 31-34. This affirmation stated as follows concerning the factual basis for withdrawing the

plea:

> I am the Defendant in the above entitled matter. I make this affidavit based upon personal information, knowledge and belief in support of the above Motion.
>
> 1. I was charged with and later plead guilty to two counts of Delivery of a Controlled Substance, pursuant to a plea agreement with the State. I am currently incarcerated in the Lewis County Jail on this case.
>
> 2. I believe I was coerced into pleading guilty by my attorney at the time, Chris Baum.
>
> 3. Mr. Baum, from the beginning of our contact, urged me to plead guilty, he did not answer my questions about the charges. I called his office several times and he never returned a call, he only came to visit me in jail the day we had court, he never talked with me about the possibility of a 3.6 hearing, he wasn't willing to discuss the case with me other than telling me I had to take the deal.

CP 32.

The case later came on for the defendant's motion to withdraw his guilty plea with the defendant taking the stand in support of his motion, and the state calling Mr. Baum in opposition. RP 11/3/11 3. During this testimony, the defendant repeated his claims from his affirmation, and Mr. Baum testified that he fully informed the defendant of his right to go to a jury trial and did not in any way coerce him into pleading guilty. RP 11/3/11 6-22, 24-37. During his direct examination, the defendant stated the following concerning his perceived need for drug treatment:

> Q. Do you believe you have any type of drug problem?

A. I used to.

Q. But at the time of this case, do you believe you do?

A. No.

Q. No?

A. I've been clean since December 28th of 2010.

RP 11/3/11 20.

Following the defendant's direct examination and the state's cross-examination of the defendant, the court itself cross-examined the defendant, repeatedly asking the defendant to admit that he had "lied" to the court during his guilty plea colloquy. RP 11/3/11 21-22. This cross-examination by the court went as follows:

> Q. Mr. Halsten, when you appeared in front of me I asked you if this plea was the result of any threats, promises, or coercion against you or anyone else. Do you remember me asking that question?
>
> A. Yes, sir, I do.
>
> Q. You answered it was not.
>
> A. Right.
>
> Q. All right. So you lied to me then. Is that what you're saying?
>
> A. Yes, I guess I did.
>
> Q. And I asked you if you were doing this on your own, if anyone was forcing you to do it. You said no. So you lied to me again, right?
>
> A. Right.

Q. And I asked you about the statement, because in your letter you were saying – that's part of the court record, you said that this wasn't my statement. I asked you whether, is this your statement and you said yes. Do you remember that?

A. Yes.

Q. So which is it? Is it your statement or is it not your statement?

A. It's not my statement.

Q. So you lied to me again -

A. Yes, I did.

Q. – is that right?

THE COURT: That's all I have.

RP 11/3/11 21-22.

Following very brief argument by counsel, the court denied the motion to withdraw guilty plea and entered the following hand-written findings of fact and conclusions of law.

> The testimony of the defendant is not credible, the testimony of his attorney (Baum) is credible, the defendant was properly represented in his change of plea, the defendant was not coerced,
>
> AND there is no lawful basis under which defendant may withdraw his plea.

CP 80.

After the denial of the motion, the case proceeded to sentencing, with the state requesting a sentence of 75 months. RP 11/3/11 40-41. The state

also opposed a prison-based DOSA sentence, arguing that it was inappropriate because the defendant had testified that he did not need treatment. RP 11/3/11 40. Following the state's argument, the defense asked the court to impose the DOSA sentence. RP 11/3/11 42. At this point the court made a somewhat cryptic statement concerning what the defendant had "reported to DOC." *Id.* The defense request and the court's statement went as follows:

> MR. BLAIR: So our first request is for the prison-based DOSA but I did explain to Ed that that might be problematic now given his under oath testimony.
>
> THE COURT: Yes, which is inconsistent with what he reported to DOC when he thought he was going to get it, or was going to at least give it a try.

RP 11/3/11 42.

In reply, the defendant's attorney stated that if the court was denying the DOSA request, the defendant was asking the court to impose 75 months, which was the recommendation agreed by the parties. RP 11/3/11 42. The court then imposed two concurrent sentences of 96 months on each count. RP 11/3/11 43; CP 84. The court gave the following reason for going over the agreed recommended sentence of the parties:

> I'm going above the recommendation here largely because he absolutely lied to me at the change of plea, he lied here today, he lied to the Department of Corrections. He is a drug dealer. He profits from that. That's why he wants to do it, and that indicates to me that he's lucky he's not getting 120 months.

RP 11/3/11 43.

Following imposition of this sentence, the defendant filed timely notice of appeal. CP 93-103.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND VIOLATED CrR 4.2(f) WHEN IT REFUSED TO ALLOW HIM TO WITHDRAW A GUILTY PLEA THAT WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). For example, guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

The reason that due process is violated when a defendant fails to enter a plea knowingly, voluntarily, and intelligently is that a plea of guilty to a criminal charge constitutes a combined waiver of a series of fundamental constitutional rights, including the right to jury trial, the right to the presumption of innocence, the right to confront the state's witnesses, the

right to testify, the right to call exculpatory witnesses, the right to compel witnesses to appear, and the right to present exculpatory evidence, among other rights. *Boykin v. Alabama*, *supra*; *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Indeed, the purpose of the court mandated guilty plea form and mandated guilty plea colloquy is to assure that a defendant who gives up so many fundamental constitutional rights is acting knowingly and voluntarily. *State v. James*, 138 Wn.App. 628, 158 P.3d 102 (2007). As with all constitutional rights, waivers will not be implied and will only be sustained if knowingly, voluntarily, and intelligently entered. *State v. Riley*, 19 Wn.App. 289, 294, 576 P.2d 1311 (1978).

The withdrawal of guilty pleas that are not made knowingly, voluntarily, and intelligently entered is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." A plea that is not knowingly, voluntarily and intelligently entered constitutes a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with First Degree Kidnaping, First

Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

> Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.
>
> The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. *See also, State v. Kissee*, 88 Wn.App. 817, 947 P.2d 262 (1997) (Mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the defendant did not voluntarily and knowingly enter his plea because his trial attorney's lack of preparation coerced the defendant into taking a plea bargain that he did not want to enter. Although the state and the court tried to characterize the defendant's desire to withdraw his plea as "buyer's remorse" after finding out that he was not going to get a DOSA sentence, the facts presented in his affidavit and the testimony at the hearing do not support this conclusion. Rather, as this evidence demonstrates, the defendant did not believe he had a drug problem and was not himself requesting such a sentence. Rather, it was his original attorney's

desire that he plead guilty and try to obtain a DOSA sentence that motivated this request. Consequently, the trial court erred when it denied the defendant's motion to withdraw his guilty plea and that denial violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as CrR 4.2(f). As a result, the defendant respectfully requests that this court vacate his conviction and remand the case with instructions to grant the motion to withdraw the guilty plea.

II. THE TRIAL COURT'S LACK OF IMPARTIALITY AND CONSIDERATION OF EVIDENCE NOT IN THE RECORD VIOLATED THE DEFENDANT'S RIGHT TO HAVE HIS CASE DECIDED BY A FAIR AND IMPARTIAL JUDGE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this constitutional right to a fair trial, every defendant is entitled to appear before a fair and impartial judge. *State ex rel. McFerran v. Justice Court*, 32 Wn.2d 544, 202 P.2d 927 (1949); *Diimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966). This principle of impartiality was a key part of the common

law and constitutes one of the fundamental principles that now gives credibility to judicial decrees and the judicial process as a whole. *State ex rel. Barnard v. Bd. of Educ.*, 19 Wash. 8, 17-18, 52 P. 317 (1898). This rule is so important that a judge must not only be fair and impartial, but must also be seen and perceived to be fair and impartial. *State ex rel. McFerran, supra.*

Where the impartiality of a judge may reasonably be questioned, Canon 2.11 of the Code of Judicial Conduct requires the judge's disqualification. *See* CJC 2.11. This is also a requirement of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as the appearance of fairness doctrine. *State v. Leon*, 133 Wn.App. 810, 138 P.3d 159 (2006). Specifically, CJC 2.11 states that judges "should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned . . .." The test for whether a judge should disqualify himself where his impartiality might reasonably be questioned is an objective one. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). The decision on this question lies within the sound discretion of the trial court. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 841, 14 P.3d 877 (2000).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that all parties received a fair, impartial, and neutral hearing. *State v. Bilal*, 77

Wn.App. 720, 893 P.2d 674 (1995). In order to establish that a trial court violated the appearance of fairness doctrine, the defendant has the burden of producing at least some evidence of the court's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992). As the court notes in *State v. Perala*, 132 Wn.App. 98, 130 P.3d 852 (2006):

> The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999). "'The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.'" *In re Marriage of Davison*, 112 Wn.App. 251, 257, 48 P.3d 358 (2002) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

State v. Perala, 132 Wn.App. at 113.

For example in *State v. Graham*, 91 Wn.App. 663, 960 P.2d 457 (1998), the state charged the defendant with first degree malicious mischief, alleging that the defendant had knowingly damaged the property of another. During the testimony of the first witness the judge hearing the case, who was an attorney sitting *pro tem*, realized that the property allegedly damaged belonged to the City of South Bend, a client of his. Although the judge stated that he did not believe this caused any actual prejudice, he did believe that a reasonable person would perceive bias or prejudice. The judge then ordered a mistrial over the defendant's objection. The defendant was later convicted in a subsequent trial with a different judge and he appealed,

arguing that the second trial violated his right to be free from double jeopardy. The state responded that double jeopardy did not apply because the duty to recuse constituted a manifest necessity that did not bar retrial. In addressing these arguments the court of appeals noted that if the judge was required to recuse himself under the facts of the case then the double jeopardy argument failed. In addressing this issue the court held:

> Like the judge in *Kelly*, Judge Sullivan was required to recuse himself. CJC 3(D)(1) provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." "The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Sherman*, 128 Wn.2d at 206, 905 P.2d 355 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied sub nom. Milken v. S.E.C.*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989)). Judge Sullivan was the city attorney for the victim. While this fact may have resulted in no actual prejudice, it did raise a reasonable question as to his impartiality. Thus, Judge Sullivan correctly perceived that he was compelled by the Canons of Judicial Conduct to recuse himself.

State v. Graham, 91 Wn.App. at 669.

In *Graham,* the perception of bias arose from the fact that a reasonably prudent person knowing all of the facts would question the judge's ability to fairly preside over a trial in which the defendant allegedly damaged property belonging to a client of the judge. Similarly, in the case

at bar, the perception of bias arises from both the judge's cross-examination of the defendant as well as the judge's comments when imposing sentence. The former involved the following questions and answers:

> Q. Mr. Halsten, when you appeared in front of me I asked you if this plea was the result of any threats, promises, or coercion against you or anyone else. Do you remember me asking that question?
>
> A. Yes, sir, I do.
>
> Q. You answered it was not.
>
> A. Right.
>
> Q. All right. So you lied to me then. Is that what you're saying?
>
> A. Yes, I guess I did.
>
> Q. And I asked you if you were doing this on your own, if anyone was forcing you to do it. You said no. So you lied to me again, right?
>
> A. Right.
>
> Q. And I asked you about the statement, because in your letter you were saying – that's part of the court record, you said that this wasn't my statement. I asked you whether, is this your statement and you said yes. Do you remember that?
>
> A. Yes.
>
> Q. So which is it? Is it your statement or is it not your statement?
>
> A. It's not my statement.
>
> Q. So you lied to me again -
>
> A. Yes, I did.

Q. – is that right?

THE COURT: That's all I have.

RP 11/30/11 21-22.

There is no reasonable way to characterize this line of questioning other than very pointed cross-examination on behalf of the state. No reasonable person hearing this line of questioning would believe that the person making it was a fair and impartial judge. Rather, a reasonable person knowing all of the facts of the case would take these questions for what they were: questions by an advocate for one side of the controversy. This lack of impartiality was exacerbated by the court's decision to exceed the sentencing recommendation of both parties based upon the court's pique that the defendant had attempted to withdraw his plea. These statements were as follows:

> I'm going above the recommendation here largely because he absolutely lied to me at the change of plea, he lied here today, he lied to the Department of Corrections. He is a drug dealer. He profits from that. That's why he wants to do it, and that indicates to me that he's lucky he's not getting 120 months.

RP 11/30/11 43.

As the court candidly admits, the reason it imposed a sentence in excess of the recommendation of the parties had nothing to do with punishing the defendant for the crimes he committed. Rather, the court imposed a sentence in excess of the recommendation of the parties in order to punish the

defendant for the defendant's conduct at the plea hearing and at the motion to withdraw his guilty plea. No reasonable person could view these statements and conclude that the court was or had the appearance of "impartiality." Rather, a reasonable person would conclude that the judge was acting as an advocate in the case.

The court's further statements that the defendant "is a drug dealer" and that the defendant "profits from that" also illustrates the lack of impartiality because there was absolutely no evidence in the record to support these conclusions. The state did not allege, and the defendant did not stipulate, that he did anything other than deliver methamphetamine on two occasions, much less that he "profits" from being a "drug dealer." These mischaracterizations again illustrate the court's lack of impartiality and the lack of the appearance of impartiality. Under these circumstances, the trial judge denied the defendant due process and the requisite appearance of fairness when he failed to recuse himself from the case. As a result, the defendant respectfully requests that this court vacate the sentence and the order denying the motion to withdraw plea, and remand with instructions to have a different judge reconsider the defendant's motion.

CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to grant the motion to withdraw the guilty plea. In the alternative, this court should vacate the sentences and remand with instructions that a different judge reconsider the motion to withdraw guilty plea.

DATED this 22nd day of March, 2012.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

CrR 4.2

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty: ...

Canon 2.11
Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a *de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) [Reserved]

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated

with a lawyer who participated substantially as a lawyer or a material witness in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge disqualified by the terms of Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

(D) A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge's judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider:

(1) the total amount of financial support provided by the party relative to the total amount of the financial support for the judge's election,

(2) the timing between the financial support and the pendency of the matter, and

(3) any additional circumstances pertaining to disqualification.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 42851-2-II**
vs.	**AFFIRMATION OF SERVICE**
EDWARD HALSTEN, **Appellant.**	

STATE OF WASHINGTON)
) **: ss.**
County of Lewis)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On March 22nd 2012, I personally E-Filed and/or placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

JONATHAN MEYER
LEWIS COUNTY PROS ATTY
345 W. MAIN STREET
CHEHALIS, WA 98532

EDWARD C. HALSTEN #747465
STAFFORD CREEK CORR CTR
191 CONSTANTINE WAY
ABERDEEN, WA 98520

Dated this 22nd, day of MARCH, 2012 at LONGVIEW, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays

NO. 42851-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD CHARLES HALSTEN,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

State Cases

Constitutional Provisions

Statutes and Court Rules

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and violated CrR 4.2(f) when it refused to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered.

2. The trial court's lack of impartiality and consideration of evidence not in the record violated the defendant's right to have his case decided by a fair and impartial judge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, and violate CrR 4.2(f) if it refuses to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered?

2. Does a trial court's lack of impartiality and consideration of evidence not in the record violate a defendant's right to have his case decided by a fair and impartial judge under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

By information filed August 15, 2011, the Lewis County Prosecutor charged the defendant Edward Charles Halsten with two counts of delivery of methamphetamine occurring on June 14, 2011, and July 27, 2011, and one count of possession of methamphetamine with intent to deliver on August 12, 2011. CP 1-3. The information did not allege any enhancements. *Id.* The state later filed a witness list with four names on it, including two police officers, a forensic scientist and a confidential informant. CP 5. At the defendant's first appearance, the court appointed an attorney to represent him on its finding that the defendant was indigent. RP 11/3/11 6-8[1]. That attorney later withdrew, apparently upon finding out that he had or was then representing the confidential informant in the case. CP 6-7; RP 11/3/11. Following this withdrawal, the court appointed Mr. Christopher Baum to represent the defendant. RP 11/3/11 7.

Following his appointment, the defendant's new attorney met with the prosecuting attorney and negotiated a plea bargain. RP 11/3/11 24-26. Under that agreement the defendant would plea to the two delivery charges in counts I and II, in return for a dismissal of the third count, a

---

[1]The record on appeal includes a verbatim report for the guilty plea hearing from September 29, 2011, and the combined Motion to Withdraw Guilty Plea and sentencing hearing from November 20, 2011. Since the court reporter did not consecutively number the two volumes, there are referred to herein as "RP [hearing date] [page #]."

recommendation from the state of 75 months in prison on a range of 60 to 120 months on an offender score of 7 points, along with the right to request a prison based DOSA sentence. *Id.* According to Mr. Baum, he spoke in detail with the defendant about the facts of the case, the state's evidence, and the possible outcome of a trial. RP 11/3/11 24-28. In addition Mr. Baum later testified that he had tried to get the defendant admitted into drug court, but the prosecutor refused based upon the type of charges. *Id.* According to the defendant, Mr. Baum had failed to talk to him about the evidence in his case, and had implicitly coerced him into accepting the plea bargain by failing to even talk to the defendant about the facts of the case, much less prepare a defense. RP 11/3/11 6-10.

Regardless of which version of events was correct, the record is clear that on September 29, 2011, the defendant appeared with Mr. Baum and pled guilty under the plea agreement. RP 9/29/11 1-10. During the guilty plea colloquy, the court did not tell the defendant that he had the right to go to trial before a jury, the right to cross-examine the state's witnesses, the right to call his own witnesses, and the right to compel the presence of those witnesses. RP 9/29/11 1-10. Rather, the court made the following short statement to the defendant and then asked the following question: "On the second page [of the guilty plea form] is a listing of the right that you have. Did you review you[r] rights with Mr. Baum?" The defendant replied by

saying "Yes, I have." RP 9/29/11 8.

During the guilty plea colloquy, the court also asked the defendant: "Is anyone forcing you to do this." RP 9/29/11 10. The defendant responded with a single word "No." *Id.* The court did not ask the defendant whether or not he was satisfied with the services of his court-appointed attorney and did not ask whether or not he felt compelled to plead guilty based upon his perceived deficiencies in the representation he received. *Id.* In fact, the entirety of the colloquy between the court and the defendant takes up about four pages of transcript. RP 9/29/11 7-11. The following quotes that colloquy in its entirety:

> THE COURT: All right. You are Edward Halsten?
>
> THE DEFENDANT: Yes, I am, sir.
>
> THE COURT: Mr. Halsten, have you heard, understood, and do you agree with everything your attorney has told me so far?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: I'm told you're considering entering a plea of guilty to Count One, delivery of – and Two, delivery of controlled substance. Is that what you think you're doing?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you gone over each and every line of this statement of defendant on plea of guilty with Mr. Baum?
>
> THE DEFENDANT: Yes, I have, Your Honor.
>
> THE COURT: Do you feel you understand it completely?

THE DEFENDANT: Yes.

THE COURT: On the first page there's the name of each crime and the elements of each crime. The elements are what the state has to prove beyond a reasonable doubt for you to be found guilty of these offenses. Did you review the elements with Mr. Baum?

THE DEFENDANT: Yes, I have.

THE COURT: Do you feel you understand them?

THE DEFENDANT: Yes.

THE COURT: On the second page is a listing of the rights that you have. Did you review you rights with Mr. Baum?

THE DEFENDANT: Yes, I have.

THE COURT: Do you feel you understand your rights?

THE COURT: You understand you give those rights up by entering a plea of guilty.

THE DEFENDANT: Yes.

THE COURT: On the fourth page is a sentencing recommendation that the prosecutor will make at the time of sentencing, which will not be today. I'm assuming that you have reviewed that carefully with Mr. Baum; is that correct?

THE DEFENDANT: Yes.

THE COURT: You understand that the sentencing judge, whoever it may be, does not have to follow that recommendation and is free to give you any sentence the judge feels is appropriate regardless of what anyone else may recommend.

THE DEFENDANT: Yes, sir.

THE COURT: That includes not accepting the DOSA –

THE DEFENDANT: Right.

THE COURT: – an alternative. Do you understand that?

THE DEFENDANT: Right.

THE COURT: All right. Knowing that you're giving up your rights and that the sentencing judge is not bound by the prosecutor's recommendation here, do you still wish to enter a plea of guilty?

THE DEFENDANT: Yes, I do.

THE COURT: You understand that if you're not a citizen of the United States a plea of guilty to this offense could result in a change in your alien status including deportation.

THE DEFENDANT: Yes.

THE COURT: Is anyone forcing you to do this?

THE DEFENDANT: No.

THE COURT: Has anyone threatened harm of any kind against you or anyone else to cause you to enter this plea?

THE DEFENDANT: No.

THE COURT: Or these pleas I should say. Other than what the prosecutor promises to recommend at sentencing, has anyone made any promises to you to cause you to enter this plea?

THE DEFENDANT: No.

THE COURT: In paragraph 11 you're asked to state in your own words what it is that you did that makes you guilty of this offense, and here's what appears there: In Lewis County on June 14th, 2011 and July 27th, 2011 I knowingly delivered methamphetamine. When you say you knowingly delivered methamphetamine, you knew what it was that you were delivering; is that correct?

THE DEFENDANT: Yes.

THE COURT: With that addition, is that your statement?

THE DEFENDANT: Yes, it is.

THE COURT: Is it a true statement?

THE DEFENDANT: Yes, it is.

THE COURT: Then to the charge in Count One of violation of the Uniform Controlled Substances Act, delivery of methamphetamine, what is your plea, guilty or not guilty?

THE DEFENDANT: Guilty.

THE COURT: Count Two, a violation of the Uniform Controlled Substances Act, delivery of methamphetamine?

THE DEFENDANT: Guilty.

THE COURT: Guilty? All right. I'll find your pleas are knowingly, intelligently, and voluntarily made with an understanding of the charges and the consequences of the plea, there's a factual basis for each plea, and that you're guilty as charged. All right. You have the order for the DOSA evaluation?

RP 9/29/11 7-11.

Very shortly after entering this guilty plea, the defendant instructed his attorney to file a motion to withdraw the plea on an argument that counsel had coerced the plea by failure to adequately prepare the case. CP 26; RP 11/3/11 28-33. Based upon that allegation, the court appointed a new attorney to represent the defendant. *Id.* This new attorney prepared a motion and filed it along with an affirmation by the defendant. CP 31-34. This affirmation stated as follows concerning the factual basis for withdrawing the

plea:

> I am the Defendant in the above entitled matter. I make this affidavit based upon personal information, knowledge and belief in support of the above Motion.
>
> 1. I was charged with and later plead guilty to two counts of Delivery of a Controlled Substance, pursuant to a plea agreement with the State. I am currently incarcerated in the Lewis County Jail on this case.
>
> 2. I believe I was coerced into pleading guilty by my attorney at the time, Chris Baum.
>
> 3. Mr. Baum, from the beginning of our contact, urged me to plead guilty, he did not answer my questions about the charges. I called his office several times and he never returned a call, he only came to visit me in jail the day we had court, he never talked with me about the possibility of a 3.6 hearing, he wasn't willing to discuss the case with me other than telling me I had to take the deal.

CP 32.

The case later came on for the defendant's motion to withdraw his guilty plea with the defendant taking the stand in support of his motion, and the state calling Mr. Baum in opposition. RP 11/3/11 3. During this testimony, the defendant repeated his claims from his affirmation, and Mr. Baum testified that he fully informed the defendant of his right to go to a jury trial and did not in any way coerce him into pleading guilty. RP 11/3/11 6-22, 24-37. During his direct examination, the defendant stated the following concerning his perceived need for drug treatment:

> Q. Do you believe you have any type of drug problem?

A. I used to.

Q. But at the time of this case, do you believe you do?

A. No.

Q. No?

A. I've been clean since December 28th of 2010.

RP 11/3/11 20.

Following the defendant's direct examination and the state's cross-examination of the defendant, the court itself cross-examined the defendant, repeatedly asking the defendant to admit that he had "lied" to the court during his guilty plea colloquy. RP 11/3/11 21-22. This cross-examination by the court went as follows:

> Q. Mr. Halsten, when you appeared in front of me I asked you if this plea was the result of any threats, promises, or coercion against you or anyone else. Do you remember me asking that question?
>
> A. Yes, sir, I do.
>
> Q. You answered it was not.
>
> A. Right.
>
> Q. All right. So you lied to me then. Is that what you're saying?
>
> A. Yes, I guess I did.
>
> Q. And I asked you if you were doing this on your own, if anyone was forcing you to do it. You said no. So you lied to me again, right?
>
> A. Right.

Q. And I asked you about the statement, because in your letter you were saying – that's part of the court record, you said that this wasn't my statement. I asked you whether, is this your statement and you said yes. Do you remember that?

A. Yes.

Q. So which is it? Is it your statement or is it not your statement?

A. It's not my statement.

Q. So you lied to me again -

A. Yes, I did.

Q. – is that right?

THE COURT: That's all I have.

RP 11/3/11 21-22.

Following very brief argument by counsel, the court denied the motion to withdraw guilty plea and entered the following hand-written findings of fact and conclusions of law.

> The testimony of the defendant is not credible, the testimony of his attorney (Baum) is credible, the defendant was properly represented in his change of plea, the defendant was not coerced,
>
> AND there is no lawful basis under which defendant may withdraw his plea.

CP 80.

After the denial of the motion, the case proceeded to sentencing, with the state requesting a sentence of 75 months. RP 11/3/11 40-41. The state

also opposed a prison-based DOSA sentence, arguing that it was inappropriate because the defendant had testified that he did not need treatment. RP 11/3/11 40. Following the state's argument, the defense asked the court to impose the DOSA sentence. RP 11/3/11 42. At this point the court made a somewhat cryptic statement concerning what the defendant had "reported to DOC." *Id.* The defense request and the court's statement went as follows:

> MR. BLAIR: So our first request is for the prison-based DOSA but I did explain to Ed that that might be problematic now given his under oath testimony.
>
> THE COURT: Yes, which is inconsistent with what he reported to DOC when he thought he was going to get it, or was going to at least give it a try.

RP 11/3/11 42.

In reply, the defendant's attorney stated that if the court was denying the DOSA request, the defendant was asking the court to impose 75 months, which was the recommendation agreed by the parties. RP 11/3/11 42. The court then imposed two concurrent sentences of 96 months on each count. RP 11/3/11 43; CP 84. The court gave the following reason for going over the agreed recommended sentence of the parties:

> I'm going above the recommendation here largely because he absolutely lied to me at the change of plea, he lied here today, he lied to the Department of Corrections. He is a drug dealer. He profits from that. That's why he wants to do it, and that indicates to me that he's lucky he's not getting 120 months.

RP 11/3/11 43.

Following imposition of this sentence, the defendant filed timely notice of appeal. CP 93-103.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, AND VIOLATED CrR 4.2(f) WHEN IT REFUSED TO ALLOW HIM TO WITHDRAW A GUILTY PLEA THAT WAS NOT KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED.

Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 36 P.3d 1005 (2001). For example, guilty pleas that are entered without a statement of the consequences of the sentence are not "knowingly" made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

The reason that due process is violated when a defendant fails to enter a plea knowingly, voluntarily, and intelligently is that a plea of guilty to a criminal charge constitutes a combined waiver of a series of fundamental constitutional rights, including the right to jury trial, the right to the presumption of innocence, the right to confront the state's witnesses, the

right to testify, the right to call exculpatory witnesses, the right to compel witnesses to appear, and the right to present exculpatory evidence, among other rights. *Boykin v. Alabama*, *supra*; *State v. Majors*, 94 Wn.2d 354, 356, 616 P.2d 1237 (1980). Indeed, the purpose of the court mandated guilty plea form and mandated guilty plea colloquy is to assure that a defendant who gives up so many fundamental constitutional rights is acting knowingly and voluntarily. *State v. James*, 138 Wn.App. 628, 158 P.3d 102 (2007). As with all constitutional rights, waivers will not be implied and will only be sustained if knowingly, voluntarily, and intelligently entered. *State v. Riley*, 19 Wn.App. 289, 294, 576 P.2d 1311 (1978).

The withdrawal of guilty pleas that are not made knowingly, voluntarily, and intelligently entered is also governed by court rule. Under CrR 4.2(f), a court must allow a defendant to withdraw a guilty plea if necessary to correct a "manifest injustice." A plea that is not knowingly, voluntarily and intelligently entered constitutes a manifest injustice. *State v. Saas*, 118 Wn.2d 37, 820 P.2d 505 (1991). Finally, since pleas which are not knowingly, voluntarily, and intelligently entered violate a defendant's right to due process, they may be challenged for the first time on appeal. *State v. Van Buren*, 101 Wn.App. 206, 2 P.3d 991 (2000).

For example, in *State v. Walsh*, 143 Wn.2d 1, 17 P.3d 591 (2001), the state originally charged the defendant with First Degree Kidnaping, First

Degree Rape, and Second Degree Assault. The defendant later agreed to plead guilty to a single charge of Second Degree Rape upon the state's agreement to recommend a low end sentence upon a range that both the state and the defense miscalculated at 86 to 114 months. In fact, at sentencing, the court and the attorneys determined that the defendant's correct standard range was from 95 to 125 months. Although the state recommended the low end of the standard range, the court imposed an exceptional sentence of 136 months based upon a finding of intentional cruelty. The defendant thereafter appealed, arguing that his plea was not voluntarily, knowingly, and intelligently made, based upon the error in calculating his standard range.

On appeal, the Court of Appeals affirmed, finding that since the defendant did not move to withdraw his guilty plea at the time of sentencing when the correct standard range was determined, he waived his right to object to the acceptance of his plea. On further review, the Washington Supreme Court reversed, finding that (1) a claim that a plea was not voluntarily made constituted a claim of constitutional magnitude that could be raised for the first time on appeal, (2) that the record did not support a conclusion that the defendant waived his right to claim his plea was involuntarily, and (3) a plea entered upon a mistaken calculation of the standard range is not knowingly and voluntarily made. The court stated the following on the final two holdings:

> Walsh has established that his guilty plea was involuntary based upon the mutual mistake about the standard range sentence. Where a plea agreement is based on misinformation, as in this case, generally the defendant may choose specific enforcement of the agreement or withdrawal of the guilty plea. The defendant's choice of remedy does not control, however, if there are compelling reasons not to allow that remedy. Walsh has chosen to withdraw his plea. The State has not argued it would be prejudiced by withdrawal of the plea.
>
> The State suggests, however, that Walsh implicitly elected to specifically enforce the agreement by proceeding with sentencing with the prosecutor recommending the low end of the standard range. The record does not support this contention. Nothing affirmatively shows any such election, and on this record Walsh clearly was not advised either of the misunderstanding or of available remedies.

State v. Walsh, 143 Wn.2d at 8-9. *See also, State v. Kissee*, 88 Wn.App. 817, 947 P.2d 262 (1997) (Mistaken belief that the defendant qualifies for a SOSSA sentence is a basis upon which to withdraw a guilty plea).

In the case at bar, the defendant did not voluntarily and knowingly enter his plea because his trial attorney's lack of preparation coerced the defendant into taking a plea bargain that he did not want to enter. Although the state and the court tried to characterize the defendant's desire to withdraw his plea as "buyer's remorse" after finding out that he was not going to get a DOSA sentence, the facts presented in his affidavit and the testimony at the hearing do not support this conclusion. Rather, as this evidence demonstrates, the defendant did not believe he had a drug problem and was not himself requesting such a sentence. Rather, it was his original attorney's

desire that he plead guilty and try to obtain a DOSA sentence that motivated this request. Consequently, the trial court erred when it denied the defendant's motion to withdraw his guilty plea and that denial violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as CrR 4.2(f). As a result, the defendant respectfully requests that this court vacate his conviction and remand the case with instructions to grant the motion to withdraw the guilty plea.

II. THE TRIAL COURT'S LACK OF IMPARTIALITY AND CONSIDERATION OF EVIDENCE NOT IN THE RECORD VIOLATED THE DEFENDANT'S RIGHT TO HAVE HIS CASE DECIDED BY A FAIR AND IMPARTIAL JUDGE UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this constitutional right to a fair trial, every defendant is entitled to appear before a fair and impartial judge. *State ex rel. McFerran v. Justice Court*, 32 Wn.2d 544, 202 P.2d 927 (1949); *Diimmel v. Campbell*, 68 Wn.2d 697, 414 P.2d 1022 (1966). This principle of impartiality was a key part of the common

law and constitutes one of the fundamental principles that now gives credibility to judicial decrees and the judicial process as a whole. *State ex rel. Barnard v. Bd. of Educ.*, 19 Wash. 8, 17-18, 52 P. 317 (1898). This rule is so important that a judge must not only be fair and impartial, but must also be seen and perceived to be fair and impartial. *State ex rel. McFerran, supra.*

Where the impartiality of a judge may reasonably be questioned, Canon 2.11 of the Code of Judicial Conduct requires the judge's disqualification. *See* CJC 2.11. This is also a requirement of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, as well as the appearance of fairness doctrine. *State v. Leon*, 133 Wn.App. 810, 138 P.3d 159 (2006). Specifically, CJC 2.11 states that judges "should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned . . .." The test for whether a judge should disqualify himself where his impartiality might reasonably be questioned is an objective one. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). The decision on this question lies within the sound discretion of the trial court. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn.App. 836, 841, 14 P.3d 877 (2000).

Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that all parties received a fair, impartial, and neutral hearing. *State v. Bilal*, 77

Wn.App. 720, 893 P.2d 674 (1995). In order to establish that a trial court violated the appearance of fairness doctrine, the defendant has the burden of producing at least some evidence of the court's actual or potential bias. *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992). As the court notes in *State v. Perala*, 132 Wn.App. 98, 130 P.3d 852 (2006):

> The critical concern is determining whether a proceeding would appear to be fair to a reasonably prudent and disinterested person. *State v. Dugan*, 96 Wn.App. 346, 354, 979 P.2d 885 (1999). "'The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts.'" *In re Marriage of Davison*, 112 Wn.App. 251, 257, 48 P.3d 358 (2002) (quoting *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995)).

State v. Perala, 132 Wn.App. at 113.

For example in *State v. Graham*, 91 Wn.App. 663, 960 P.2d 457 (1998), the state charged the defendant with first degree malicious mischief, alleging that the defendant had knowingly damaged the property of another. During the testimony of the first witness the judge hearing the case, who was an attorney sitting *pro tem*, realized that the property allegedly damaged belonged to the City of South Bend, a client of his. Although the judge stated that he did not believe this caused any actual prejudice, he did believe that a reasonable person would perceive bias or prejudice. The judge then ordered a mistrial over the defendant's objection. The defendant was later convicted in a subsequent trial with a different judge and he appealed,

arguing that the second trial violated his right to be free from double jeopardy. The state responded that double jeopardy did not apply because the duty to recuse constituted a manifest necessity that did not bar retrial. In addressing these arguments the court of appeals noted that if the judge was required to recuse himself under the facts of the case then the double jeopardy argument failed. In addressing this issue the court held:

> Like the judge in *Kelly*, Judge Sullivan was required to recuse himself. CJC 3(D)(1) provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned...." "The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" *Sherman*, 128 Wn.2d at 206, 905 P.2d 355 (quoting *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1313 (2d Cir.1988), *cert. denied sub nom. Milken v. S.E.C.*, 490 U.S. 1102, 109 S.Ct. 2458, 104 L.Ed.2d 1012 (1989)). Judge Sullivan was the city attorney for the victim. While this fact may have resulted in no actual prejudice, it did raise a reasonable question as to his impartiality. Thus, Judge Sullivan correctly perceived that he was compelled by the Canons of Judicial Conduct to recuse himself.

State v. Graham, 91 Wn.App. at 669.

In *Graham,* the perception of bias arose from the fact that a reasonably prudent person knowing all of the facts would question the judge's ability to fairly preside over a trial in which the defendant allegedly damaged property belonging to a client of the judge. Similarly, in the case

at bar, the perception of bias arises from both the judge's cross-examination of the defendant as well as the judge's comments when imposing sentence. The former involved the following questions and answers:

> Q. Mr. Halsten, when you appeared in front of me I asked you if this plea was the result of any threats, promises, or coercion against you or anyone else. Do you remember me asking that question?
>
> A. Yes, sir, I do.
>
> Q. You answered it was not.
>
> A. Right.
>
> Q. All right. So you lied to me then. Is that what you're saying?
>
> A. Yes, I guess I did.
>
> Q. And I asked you if you were doing this on your own, if anyone was forcing you to do it. You said no. So you lied to me again, right?
>
> A. Right.
>
> Q. And I asked you about the statement, because in your letter you were saying – that's part of the court record, you said that this wasn't my statement. I asked you whether, is this your statement and you said yes. Do you remember that?
>
> A. Yes.
>
> Q. So which is it? Is it your statement or is it not your statement?
>
> A. It's not my statement.
>
> Q. So you lied to me again -
>
> A. Yes, I did.

Q. – is that right?

THE COURT: That's all I have.

RP 11/30/11 21-22.

There is no reasonable way to characterize this line of questioning other than very pointed cross-examination on behalf of the state. No reasonable person hearing this line of questioning would believe that the person making it was a fair and impartial judge. Rather, a reasonable person knowing all of the facts of the case would take these questions for what they were: questions by an advocate for one side of the controversy. This lack of impartiality was exacerbated by the court's decision to exceed the sentencing recommendation of both parties based upon the court's pique that the defendant had attempted to withdraw his plea. These statements were as follows:

> I'm going above the recommendation here largely because he absolutely lied to me at the change of plea, he lied here today, he lied to the Department of Corrections. He is a drug dealer. He profits from that. That's why he wants to do it, and that indicates to me that he's lucky he's not getting 120 months.

RP 11/30/11 43.

As the court candidly admits, the reason it imposed a sentence in excess of the recommendation of the parties had nothing to do with punishing the defendant for the crimes he committed. Rather, the court imposed a sentence in excess of the recommendation of the parties in order to punish the

defendant for the defendant's conduct at the plea hearing and at the motion to withdraw his guilty plea. No reasonable person could view these statements and conclude that the court was or had the appearance of "impartiality." Rather, a reasonable person would conclude that the judge was acting as an advocate in the case.

The court's further statements that the defendant "is a drug dealer" and that the defendant "profits from that" also illustrates the lack of impartiality because there was absolutely no evidence in the record to support these conclusions. The state did not allege, and the defendant did not stipulate, that he did anything other than deliver methamphetamine on two occasions, much less that he "profits" from being a "drug dealer." These mischaracterizations again illustrate the court's lack of impartiality and the lack of the appearance of impartiality. Under these circumstances, the trial judge denied the defendant due process and the requisite appearance of fairness when he failed to recuse himself from the case. As a result, the defendant respectfully requests that this court vacate the sentence and the order denying the motion to withdraw plea, and remand with instructions to have a different judge reconsider the defendant's motion.

CONCLUSION

This court should vacate the defendant's convictions and remand with instructions to grant the motion to withdraw the guilty plea. In the alternative, this court should vacate the sentences and remand with instructions that a different judge reconsider the motion to withdraw guilty plea.

DATED this 22nd day of March, 2012.

Respectfully submitted,

John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION
ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

. . .

CrR 4.2

(a) Types. A defendant may plead not guilty, not guilty by reason of insanity, or guilty.

(b) Multiple Offenses. Where the indictment or information charges two or more offenses in separate counts the defendant shall plead separately to each.

(c) Pleading Insanity. Written notice of an intent to rely on the insanity defense, and/or a claim of present incompetency to stand trial, must be filed at the time of arraignment or within 10 days thereafter, or at such later time as the court may for good cause permit. All procedures concerning the defense of insanity or the competence of the defendant to stand trial are governed by RCW 10.77.

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(e) Agreements. If the defendant intends to plead guilty pursuant to an agreement with the prosecuting attorney, both the defendant and the prosecuting attorney shall, before the plea is entered, file with the court their understanding of the defendant's criminal history, as defined in RCW 9.94A.030. The nature of the agreement and the reasons for the agreement shall be made a part of the record at the time the plea is entered. The validity of the agreement under RCW 9.94A.090 may be determined at the same hearing at which the plea is accepted.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

(g) Written Statement. A written statement of the defendant in substantially the form set forth below shall be filed on a plea of guilty: ...

Canon 2.11
Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a *de minimis* interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) [Reserved]

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated

with a lawyer who participated substantially as a lawyer or a material witness in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge disqualified by the terms of Rule 2.11(A)(2) or Rule 2.11(A)(3) may, instead of withdrawing from the proceeding, disclose on the record the basis of the disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing or on the record that the judge's relationship is immaterial or that the judge's economic interest is de minimis, the judge is no longer disqualified, and may participate in the proceeding. When a party is not immediately available, the judge may proceed on the assurance of the lawyer that the party's consent will be subsequently given.

(D) A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge's judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider:

(1) the total amount of financial support provided by the party relative to the total amount of the financial support for the judge's election,

(2) the timing between the financial support and the pendency of the matter, and

(3) any additional circumstances pertaining to disqualification.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION II

STATE OF WASHINGTON, **Respondent,**	**NO. 42851-2-II**
vs.	**AFFIRMATION OF SERVICE**
EDWARD HALSTEN, **Appellant.**	

STATE OF WASHINGTON)
) **: ss.**
County of Lewis)

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On March 22nd 2012, I personally E-Filed and/or placed in the mail the following documents

1. BRIEF OF APPELLANT
2. AFFIRMATION OF SERVICE

to the following:

JONATHAN MEYER
LEWIS COUNTY PROS ATTY
345 W. MAIN STREET
CHEHALIS, WA 98532

EDWARD C. HALSTEN #747465
STAFFORD CREEK CORR CTR
191 CONSTANTINE WAY
ABERDEEN, WA 98520

Dated this 22nd, day of MARCH, 2012 at LONGVIEW, Washington.

/S/

Cathy Russell
Legal Assistant to John A. Hays

HAYS LAW OFFICE

March 22, 2012 - 3:29 PM

Transmittal Letter

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Case Name: State v. Edward Halsten

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